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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MYRON XAVIER CASTRO, Defendant and Appellant.	D054738 (Super. Ct. No. SCD217064)

APPEAL from a judgment of the Superior Court of San Diego County, Richard S. Whitney, Judge. Affirmed in part; reversed and remanded for retrial as to count 3.

I.

INTRODUCTION

Defendant Myron Castro appeals from a judgment of conviction after a jury trial. The jury convicted Castro of one count of possession of a controlled substance (cocaine base) and one count of child abuse. On appeal, Castro argues that the trial court should have given the jury a unanimity instruction because there was evidence of two possible

acts that could have formed the basis of his conviction on the charge of possession of a controlled substance. Specifically, Castro contends that there was evidence of two or more separate stashes of drugs that could have formed the basis of the offense, and therefore, some jurors could have convicted him based on a belief that he possessed one stash of drugs, while other jurors may have convicted him based on a belief that he possessed a different stash of drugs.

We agree with Castro's contention that because the prosecutor did not elect which of the qualifying acts of possession he was relying on, it was incumbent on the court to give a unanimity instruction. We further conclude that the court's failure to give a unanimity instruction in these circumstances was prejudicial because we cannot determine whether the jury unanimously agreed on the factual basis for the conviction. The judgment must therefore be reversed as to count 3, and the case remanded for a new trial on that count.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

On October 30, 2008, at approximately 9:30 a.m., San Diego police officers executed a search warrant at a single family, three-bedroom home in the City of San Diego.[1]

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1 Police officers obtained the search warrant after an undercover officer purchased $20 worth of rock cocaine from a woman inside the residence on October 15, 2008.

When officers arrived, Cynthia Madrigal was standing on a walkway outside the house, near the front door. The two-year-old son of Madrigal and Castro was sitting at the threshold of the front door.

Officer Kelvin Lujan searched the southwest bedroom of the home. Antoinette Rhodes and her six-month-old child were in the room, which contained infant and toddler clothing, as well as women's clothing. As Lujan searched the room, he found a container for M&M candies on the floor, near a child's walker. Inside the M&M container, Lujan found four pieces of an off-white substance, which Lujan suspected was rock cocaine. The amount was a usable amount. Lujan testified that it took little, if any, force to open the lid to the container.

Officer Jovanna Derrough searched the northwest bedroom of the house. In that bedroom she found Ray Rhodes, lying on a bed, and Marjorie Shanklin, Rhodes's caretaker. Derrough found a bag of marijuana, a digital scale, and a cocaine pipe in the nightstand next to the bed, and also found new plastic baggies and over $1000 in $20 bills.

Detective Michael Rubio searched the southeast bedroom upon entering the residence. He found Castro in that bedroom, standing about one to one and a half feet from a window that faced the backyard. The window was open, and the bottom right corner of the screen had been pushed back, leaving it partially open. The screen was pushed out approximately three to twelve inches, which was sufficient space for someone

to put a hand through and throw or drop something out the window.[2] Rubio looked outside of the southeast bedroom window and saw a plastic baggie on the ground, approximately three to five feet from the window. Rubio also found $75 in cash in a shoe box on a small dresser near the window, as well as a number of identification cards that belonged to Castro.

A fence enclosed the backyard, such that there was no access to the yard from the street. Several officers had been assigned to watch the backyard from outside the backyard fence to detect any suspects who might run out of the residence.

Detective Rubio told officers that they would have to retrieve the plastic baggie from the backyard. Officers asked Castro about a dog that was in the backyard, and he told them that the dog was vicious. However, when officers entered the backyard, they found that the dog was secured, and that it was passive and friendly. Officers recovered the baggie and discovered that it contained approximately 10 pieces of rock cocaine. Officers also found a smoking pipe that had burned residue on both ends, and a clear plastic baggie with drug residue on it, between a brick and the window sill of the southeast bedroom.

At the time officers executed the search warrant, there were four adults inside the residence and one just outside the front door. While officers were searching the residence, another woman, Deborah Davis (also known as Deborah Richardson), arrived at the home and was detained outside.

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[2] The window in the southwest bedroom, which also faced the backyard, was closed.

Criminalist Lisa Merzwski analyzed the substance in the plastic baggie that was found in the backyard and determined that it was 5.53 grams of cocaine base. The substance found in the M&M container was determined to be .94 grams of cocaine base. The prosecutor called Detective Robert Newquist to testify as an expert on the issue whether the drugs found at the house were possessed for purposes of sale. Detective Newquist testified that .13 grams of rock cocaine is worth $20, and a gram of rock cocaine sells for between $80 and $120. According to Newquist, 5.5 grams could yield between 25 and 50 individual sales at $20 apiece. The detective opined that whoever possessed the 5.53 grams of cocaine found in the baggie did so for the purpose of selling it.

Madrigal testified at trial after being given use immunity by prosecutors. According to Madrigal, she, Castro, and their son slept in the southeast bedroom of the residence the night before police executed the search warrant. Madrigal said that she initially told police that Castro had slept in the family room that night because Castro had told her say that. Madrigal testified to having personal knowledge that Castro "was involved with rock cocaine" on October 30, 2008.

B. *Procedural background*

By amended information filed December 22, 2008, Castro was charged with possession of cocaine base for sale (Health & Saf. Code, § 11351.5 (count 2)); possession of cocaine base (Health & Saf. Code, § 11350, subd.(a) (count 3)); and child abuse (Pen.

Code, § 273a, subd.(a) (count 4)).[3] The information also alleged that Castro had suffered a prison prior within the meaning of Penal Code section 667.4, subdivision (b).

A jury trial was held between January 6 and January 13, 2009. The jury began deliberating on January 14. That afternoon, the jury sent a note to the trial court in which it asked the court whether a hung jury on one count would "hang the entire trial." The court conferred with counsel for the parties, and then sent a note to the jury responding, "No."

On the morning of January 15, the jury indicated that it had reached verdicts. However, when the court received the verdict forms, the verdict form for count 2 was blank with respect to a finding, but was signed and dated by the jury foreperson. The court sent the jury back to deliberate. Approximately an hour and a half later, the jury sent a note to the court indicating that it was unable to reach a verdict on count 2 ─ possession of cocaine base for sale. After questioning the jurors as to whether they were truly unable to reach a verdict on count 2, the trial court declared a mistrial on that count and dismissed it. The jury convicted Castro on counts 3 and 4 ─ possession of cocaine base and child abuse. Castro admitted having suffered a prison prior.

The court sentenced Castro to the low term of two years in state prison on count 4, and imposed the midterm of two years on count 3, to run concurrently with the term on count 4. The court also imposed a consecutive one-year term for the prison prior.

Castro filed a timely notice of appeal on March 5, 2009.

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3 Other counts in the amended information related to codefendants, only one of whom was tried with Castro.

III.

DISCUSSION

Castro contends that the trial court erred in failing to give a unanimity instruction, sua sponte, as to count 3, because the jury could have disagreed as to which stash of rock cocaine Castro possessed. According to Castro, there were "'two or more individual units of contraband'" that the jury could have found he possessed, including "the drugs found in the M&M container in the southwest bedroom; the baggie of drugs found on the grass just outside the southeast bedroom window, where appellant was standing; and the drugs sold to the undercover officer two weeks earlier." Thus, Castro contends, "[t]he jury was . . . presented with multiple different factual options" on which it could have convicted him.

"[T]o find a defendant guilty of a particular crime, the jurors must unanimously agree that the defendant committed the same specific act constituting the crime within the period alleged. [Citation.]" (*People v. Crow* (1994) 28 Cal.App.4th 440, 445; see also Cal. Const., art. I, § 16; *People v. Jones* (1990) 51 Cal.3d 294, 321.) "When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.] The duty to instruct on unanimity when no election has been made rests upon the court sua sponte. [Citation.]" (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534 (*Melhado*).) "This requirement of unanimity as to the criminal

act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).)

> "The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Id*. at pp. 1134-1135.)

1. *The court erred in failing to give a unanimity instruction*

If jurors could have reasonably relied on different stashes of drugs to convict Castro of possession of cocaine, then a unanimity instruction was required. (*People v. King* (1991) 231 Cal.App.3d 493, 501-502 (*King*).) "[I]n a prosecution for possession of narcotics for sale, where actual or constructive possession is based on two or more individual units of contraband reasonably distinguishable by a separation in time and/or space and there is evidence as to each unit from which a reasonable jury could find that it was solely possessed by a person or persons other than the defendant, absent an election by the People, CALJIC No. 17.01 must be given to assure jury unanimity." (*King, supra*,

at p. 501.)[4] Among the factors to be considered in determining whether a unanimity instruction is necessary are whether the defendant raised separate defenses to different units of narcotics, and whether there is conflicting evidence of ownership. (*People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1070-1071.)

In *King*, the defendant was convicted of possession for sale where methamphetamine was found in various locations inside a home, including inside another woman's purse. There was evidence that the home was occupied by more than one person, and the defendant's boyfriend testified that some of the drugs belonged to him, although he denied ownership of the scales, pay/owe sheets, and cutting agents that were found in the house. (*King, supra*, 231 Cal.App.3d at pp. 497-500.) Because the evidence was such that a reasonable jury could have found that each unit of drugs "was solely possessed by a person or persons other than the defendant," the court held that in the absence of an election by the prosecutor, a unanimity instruction should have been given. (*Id*. at pp. 501-502.)

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4 The *King* court also concluded that its holding "would be equally applicable had [King's] conviction been of" the "lesser offense of illegal possession of a controlled substance." (*King*, *supra*, at p. 502, fn. 1.)

We find *King* applicable to this case. Here, there were two separate chargeable acts of possession of cocaine ─ possession of the 5.53 grams of cocaine found in a baggie in the backyard, and possession of the .94 grams of cocaine found inside the M&M container.[5] These are individual units of contraband that were reasonably distinguishable by a separation of space. Further, as in *King*, the state of the evidence was such that a reasonable jury could have found that each of the two stashes of drugs was solely possessed by a person other than Castro, particularly in light of the fact that there were other residents of the house, all of whom appeared to be involved with drugs.

There is a resulting factual uncertainty in the verdicts that is attributable to the lack of an election, or, in the alternative, a unanimity instruction.

2. *The prosecutor did not make an election*

The People argue that no unanimity instruction was necessary, because "the evidence presented by the prosecution at trial and his argument clearly show[] that the prosecutor elected the 5.5 grams of rock cocaine to serve as the basis for Count 3." The People point out that the expert opined that the 5.53 grams was possessed for purposes of sale, and that he did not include the .94 grams found in the M&M container in reaching

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[5] Castro also argues that the cocaine that the undercover agent purchased from a woman at the residence approximately two weeks before officers executed the search warrant could also have formed the basis of a separate chargeable act of cocaine possession. We need not consider whether the bindle of cocaine sold to the undercover officer two weeks earlier could have served as the basis for another separate chargeable act of possession as to Castro, because we conclude that, at a minimum, the two different stashes of drugs found in the residence on the day officers executed the search warrant necessitated the giving of a unanimity instruction.

his opinion. The People also argue that the prosecutor "focused on the possession for sale count (2) in closing argument."

Contrary to the People's contention, the record reflects no election by the prosecutor. An election as to which of multiple acts the prosecution is relying must be "clearly communicated to the jury." (*Melhado*, *supra*, 60 Cal.App.4th at p. 1539.) The *Melhado* court explained,

> "Because the prosecution's election was never clearly communicated to the jury, the trial court should have instructed on unanimity. To hold otherwise would leave open the door to allowing a prosecutor's artful argument to replace careful instruction. If the prosecution is to communicate an election to the jury, its statement must be made with as much clarity and directness as would a judge in giving instruction. The record must show that by virtue of the prosecutor's statement, the jurors were informed of their duty to render a unanimous decision as to a particular unlawful act." (*Ibid*.)

The prosecutor in this case failed to adequately distinguish between the two separate quantities of cocaine that were found in the home, and did not clearly communicate to the jury that he was relying on only the 5.53 grams found in the backyard to support both the possession for sale charge *and* the simple possession charge.[6]

Specifically, the prosecutor first asked Detective Newquist about the potential value of the drugs found in the baggie in the backyard. The prosecutor then asked, "Now, the approximate gram that was found in the M&M container in the southwest bedroom, about how many pieces was that broken up into?" Detective Newquist replied that he

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6 The jury did *not* convict Castro on the possession for sale charge. The charge at issue is the simple possession count.

recalled that there had been "approximately four to five pieces in the M&M container," which was consistent with Newquist's earlier description of how a gram of cocaine is usually broken up into five to ten pieces. After asking Newquist a few questions about other matters, the prosecutor asked, "Based on your training and experience, are you able to come to an opinion with regard to whether or not Mr. Castro possessed the rock cocaine for sales or for personal use?" The prosecutor did not differentiate between the two different stashes of drugs in asking this question, nor did he specifically limit his question to the 5.53 grams of cocaine found in the backyard.

Further, the prosecutor discussed both stashes of cocaine during his opening statement and closing argument. For example, during his opening statement, the prosecutor said, "Now, there's three bedrooms in this residence. To my knowledge, drugs were found in every single room." Later the prosecutor said, "Mr. Castro, the gentleman at the far end, is charged with possession for sale of rock cocaine. . . . That is for the drugs that he obviously threw into the backyard. He's also charged with simple possession of rock cocaine, and he's charged with child endangerment." The prosecutor thus appeared to be linking the evidence of the 5.53 grams of cocaine to the possession for sale charge only, thereby suggesting that there might be a different stash of drugs that supported the simple possession charge. At a minimum, the prosecutor's argument left open the possibility that he was relying on a different stash of drugs to support the simple possession charge, and the evidence developed at trial showed that on the day officers searched the home, they found at least two stashes of cocaine in or near the residence.

Similarly, in making his closing argument, the prosecutor discussed both the drugs found in the backyard and the drugs in the M&M container as he related the evidence to the elements of the offense of possession for sale. Specifically, in going through the evidence relating to the particular elements of that offense, the prosecutor said, "What is not at issue – let's start at the bottom. It was a useable amount of rock cocaine. Now, that's referring to the five and a half grams that are in that big bag *along with the stuff that was in the M&M container*, if you will." (Italics added.) Later, the prosecutor argued, "I might also point out at this time with regard to the possession [for] sales there is also the undercover buy . . . [¶] There is also a gram in the other room in the M&M container." The prosecutor thus referred to evidence of multiple, distinct stashes of cocaine in discussing the charge of possession for sale.

Although the prosecutor may have placed greater emphasis on the 5.53 grams of cocaine than on the cocaine found in the M&M container, this did not satisfy the requirement that the prosecution elect to seek conviction only for the 5.53 grams of cocaine in order to avoid the necessity of a unanimity instruction. Emphasizing a particular act is not equivalent to directly informing the jury of an election and of the jury's concomitant duty to convict only if the jurors unanimously agree that that a particular act of possession took place. Because the prosecutor did not directly inform jurors of his election to rely on only the 5.53 grams of cocaine found in the backyard to serve as the basis for count 3, it was incumbent on the court to provide jurors with a unanimity instruction.

3. *The error was prejudicial*

We cannot conclude that the error in failing to give a unanimity instruction was harmless. There is a split of authority as to whether the applicable harmless error standard for failure to give a unanimity instruction is the state law standard in *People v. Watson* (1956) 46 Cal.2d 818, or rather, the federal constitutional standard in *Chapman v. California* (1967) 386 U.S. 18. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-186 (*Wolfe*) [listing cases applying different standards of review].) Like the court in *Wolfe*, we conclude that the reasoning supporting application of the federal constitutional standard is more persuasive:

> "'The applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case . . . .' [Citation.] Like the requirement of jury unanimity, the definition of a crime is a matter of state law (subject to federal constitutional limits). [Citation] However, once state law has defined what constitutes a single instance of a crime—the unit of prosecution— the federal Constitution requires proof beyond a reasonable doubt that the defendant committed that crime." (*Id*. at p. 186, italics omitted.)

Under the *Chapman* harmless error standard the question is "'whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on *evidence* establishing the requisite [elements of the crime] independently of the force of the . . . misinstruction.' [Citation.]" (*Wolfe*, *supra*, 114 Cal.App.4th at p. 188.)

The evidence in this case was such that the jury could have found Castro guilty of possession based on either the 5.53 grams of rock cocaine found in the backyard, or the smaller quantity found in an M&M container in another bedroom. However, it is impossible to determine whether all of the jurors agreed as to the particular criminal act

that formed the basis of the guilty verdict. This is particularly so because, although the prosecutor focused on the evidence of the 5.53 grams found in the baggie in the backyard with respect to the possession for sale count, the jury *did not convict* Castro on that count. It is possible that at least some of the jurors did not convict Castro of possession for sale because they did not believe beyond a reasonable doubt that he possessed that particular stash of drugs, while others may have simply been unconvinced that he possessed those drugs for the purpose of selling them. If some of the jurors did not believe that Castro possessed that stash of drugs at all, they may have convicted him on count 3 based on the smaller stash of drugs found inside the M&M container—a stash that was more consistent with possession for personal use than was the 5.53 grams found in the backyard.

In light of the instructions given, the evidence presented, the prosecutor's arguments, the time the jury took to consider the matter, and the jury's failure to convict on the possession for sale charge, we cannot conclude beyond a reasonable doubt that the jury unanimously agreed as to what constituted Castro's single act of possessing cocaine. We therefore cannot conclude that the instructional error was harmless. Reversal is thus required.

IV.

DISPOSITION

The judgment of conviction for possessing cocaine base (count 3) is reversed, and the case is remanded for a new trial. Because Castro has not otherwise challenged the judgment, the judgment is affirmed in all other respects.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.